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No. 97-1418

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

203 NORTH LASALLE STREET PARTNERSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE AMICI CURIAE AND BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION and CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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April 1, 1998

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In accordance with the provisions of Rule 37.2(b) of the Supreme Court Rules, the American Bankers Association and California Bankers Association hereby respectfully move

the Court for leave to file the attached brief as amici curiae in support of the Petitioner. The Petitioner has granted consent to this filing but the Respondent has withheld consent.

The American Bankers Association is the principal national trade association of the banking industry in the United States. Its membership includes both commercial banks and thrift institutions located in each of the fifty states and the District of Columbia, and those institutions hold approximately ninety percent of the domestic assets of the industry.

The California Bankers Association is the principal state-based trade association for the lending industry in California, representing virtually all of the commercial banks and trust companies in that state.

Both associations frequently appear in litigation either as a party or as amicus curiae in cases raising issues of widespread importance to their members. Litigation over the alleged "new value exception" to the absolute priority rule in bankruptcy is a case in point. The American Bankers Association was permitted to appear as amicus curiae in this Court in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), a case in which the question raised by this case was left open. Both associations were permitted to appear as amici curiae in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), a case in which this Court granted certiorari in order to resolve the same conflict among the circuits that justifies the grant of certiorari in this case. The conflict was not resolved in *Bonner Mall* due to a settlement of the case prior to argument in this Court. The conflict thus continues and has in fact been exacerbated since

1994. Consequently, the interests of the two associations in securing a uniform understanding and application of national bankruptcy law, which only this Court can now supply, remain unchanged from the earlier cases.

We therefore urge the Court to grant leave to the associations once again to provide what we hope will be a perspective on the issues that is broader than those of the immediate parties to this case.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Bankruptcy Code authorizes the confirmation of a Chapter 11 plan of reorganization that provides that existing equity owners will contribute "new value" to the reorganization and will own equity in the reorganized debtor, even though the plan does not provide for full payment to a senior, objecting class of unsecured creditors.

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BRIEF OF THE AMICI CURIAE[1] AMERICAN BANKERS ASSOCIATION and CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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[1] No counsel for any party had any role in authoring this brief and no person other than amici curiae made any monetary contribution to its preparation or submission.

The American Bankers Association and California Bankers Association hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.2 of the Supreme Court Rules.

INTEREST OF THE AMICI CURIAE

As indicated in the foregoing motion, the American Bankers Association and California Bankers Association are, respectively, the principal trade associations for the lending industry nationwide and in the State of California. As representatives for that industry, the associations have a vital interest in this case. The uncertainty as to the existence of a "new value exception" to the absolute priority rule that is engendered by the continuing conflict among the lower courts adds to the litigation costs of lenders and affects the "settlement" value of cases to the detriment of lenders. If the decision of the court of appeals in this case remains unreviewed and unreversed, then the capacity of debtors to retain equity interests in property without paying objecting creditors in full, at least in the states of the Seventh Circuit and California and the other states of the Ninth Circuit, will adversely affect lenders' litigation and negotiation strategy in bankruptcy cases, their willingness to make new loans on terms and conditions and at prices that would have been in effect otherwise, and their willingness to work out troubled loans as well.

A "new value exception" to the absolute priority rule, admittedly found nowhere in the statutory language,[2] is costly and disruptive, and upsets the priorities Congress clearly placed in the statute after long and careful deliberation. Since virtually all debtors are insolvent, the costs of bankruptcy fall almost exclusively upon creditors, many of whom are represented by your amici. The "exception," if it is found to exist, delays resolution of bankruptcy cases, gives additional leverage to owners, substitutes a vague standard for the specific statutory language of Section 1129(b), thereby increasing transaction costs, and ultimately transfers reorganization value from creditors (where Congress said it belongs) to existing owners.

This is not merely a matter of academic interest, more theoretical than real, but rather a matter of great practical consequence to lenders and debtors alike. It is a matter that is litigated with considerable regularity, but with no consistent outcome. Indeed, as the Petition for Writ of Certiorari points out, there have been over 100 published cases from the lower courts on point since this Court's *Ahlers* decision ten years ago. (Petition for Writ of Certiorari at 13, citing Trost, *Survey of the New Value Exception to the Absolute Priority Rule and the Preliminary Problem of Classification*, SB37 ALI-ABA 595, 677-699 (1997)).

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[2] "At the time it codified the absolute priority rule, Congress did not explicitly codify the new value corollary." *In the Matter of 203 North LaSalle Street Partnership*, 126 F.3d 955, 963 (7th Cir. 1997).

REASONS FOR GRANTING THE WRIT

The Conflict Among The Circuits

A Chapter 11 Plan can only be confirmed if it is (among other things) "fair and equitable." 11 U.S.C. § 1129(b)(2). Part of what that means is that each class of unsecured creditors must be provided for in full before junior classes can receive or retain any property (unless, of course, the class in question consents to a plan that provides otherwise.) *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988). "The holder of any claim or interest that is junior to the claims of [the dissenting class] will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii).

In *In re Bryson Properties, XVIII*, 961 F.2d 496 (4th Cir.), *cert. denied*, 506 U.S. 866 (1992), the court held that, at the very least, where the proponents of a Chapter 11 Plan (equity owners of the corporate debtor) sought to grant themselves an *exclusive* right to contribute new capital, such an "exclusive right to contribute constitutes 'property' under § 1129(b)(2)(B)(ii), which was received or retained *on account of* a prior interest." *Id.* at 504. (emphasis added.)

The following year, in *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993), the court likewise dealt with a plan that provided to the equity owners of the debtor partnership the exclusive right to contribute new capital in exchange for corporate stock in the reorganized business. Unlike the Fourth Circuit, however, the Ninth Circuit concluded that the receipt or retention of "property" by the "junior class under these circumstances would not be "on account of" the class's earlier interest in the partnership,

but rather was "*on account of* a substantial, necessary and fair new value contribution." *Id.* at 909 (emphasis in original.).

A third circuit had, by 1993, also weighed in on the subject, though inconclusively. In *In re Greystone III Joint Venture*, 995 F.2d 1274 (5th Cir. 1991), a three-judge panel of the court dismissed the "on account of" argument as so much "wordplay, because Greystone intends to prevent creditors from acceding to ownership of the property *on account of* Greystone's unique status as an old equity contributor to the plan." *Id.* at 1283 (emphasis in original.) Rehearing was granted in part in that case, and the cited portion of the panel's opinion was withdrawn, 995 F.2d 1284 (5th Cir.)(per curiam), *cert. denied*, 506 U.S. 821 (1992).

In order to resolve the then-existing confusion among the circuits, this Court granted certiorari in *Bonner Mall*, 510 U.S. 1039 (1994). Subsequent to that, however, the parties settled among themselves, resulting in a dismissal of the case as moot, *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), and thereby postponing until another day the resolution of the conflict. That day is now.

Since the dismissal of *Bonner Mall*, the conflict among the circuits has continued and intensified. In the case below, the Seventh Circuit joined forces with the Ninth, asserting that there was an "ambiguity" in the "on account of" language, and concluding "that it is more reasonable to believe that Congress legislated on the understanding that, in new value transactions, old equity owners receive stock in exchange for the additional capital they invest....[T]he

opportunity to participate in a reorganization plan, even an exclusive right, is not retained on account of an old equity holder's former ownership interest." *In the Matter of 203 North LaSSalle Street Partnership*, 126 F.3d at 965-966.

Then, mere days before the Petition for Writ of Certiorari was filed in this case, the Second Circuit handed down its contribution to the discussion in *In re Coltex Loop Central Three Partners, L.P.*, No. 96-5140 (2d Cir. Feb. 19, 1998). That court's decision adheres closely to the reasoning of the Fourth Circuit and the withdrawn panel opinion in the Fifth Circuit, concluding that an exclusive right to retain a property interest in the debtor's property by means of contributing new capital is itself "property" that is received "on account of" the owners' prior status. Slip op. at 9. Indeed, the Second Circuit's opinion paints the conflict among the circuits in sharp colors when it makes a point of adopting the dissenting opinion in *LaSalle*. (*Id.*, Slip. op. at 8).

CONCLUSION

The two schools of thought represented by the above-cited cases are clearly irreconcilable. There is not even any clear "trend" in the decisions of the lower courts one way or the other. Only this Court can bring certainty to an important area of the law resolving a conflict that has plagued the lower courts, the bar, and the lending industry for at least a decade. The Petition should be granted.

Respectfully submitted,

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